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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Kathleen Kendrick,
Plaintiff,

vs.

Carolyn W. Colvin, Acting Commissioner
of the Social Security Administration,
Defendant.

No. CV 11-296-TUC-HCE

ORDER

Pending before the Court is Plaintiff's Petition for Attorney's Fees Under the Equal Access to Justice Act (Doc. 22). Defendant has filed a Response (Doc. 23) in opposition to Plaintiff's Petition (Doc. 23). The Magistrate Judge has jurisdiction over this matter pursuant to the parties' consent. *See* 28 U.S.C. §636(c). The Court takes judicial notice that Michael J. Astrue is no longer Commissioner of the Social Security Administration (hereinafter "SSA"). Pursuant to Rule 25(d) of the Federal Rules of Civil Procedure, the Court substitutes the Acting Commissioner of the SSA, Carolyn W. Colvin, as the named Defendant in this action. For the following reasons, the Court grants Plaintiff's Petition.

I. FACTUAL & PROCEDURAL BACKGROUND

Upon consideration of Plaintiff's action, filed pursuant to 42 U.S.C. §405(g), requesting judicial review of the final decision of the Commissioner denying her claim for

1 disability insurance benefits, this Court remanded the matter for further administrative
 2 proceedings. (*See* Doc. 20). Plaintiff now petitions the Court for \$4,063.28 in attorney's
 3 fees and \$350 in costs incurred in the form of the filing fee for Plaintiff's Complaint.

4 **II. STANDARD**

5 Under the Equal Access to Justice Act (hereinafter "EAJA"), a prevailing party in any
 6 civil action brought against the United States shall be reimbursed for fees and other expenses
 7 incurred by that party in the action unless the position of the United States was substantially
 8 justified or special circumstances make the award of fees and costs unjust. 28 U.S.C. §
 9 2412(d)(1)(A); *see also* 28 U.S.C. §§ 1920, 2412(a) (relating to costs). "The EAJA creates
 10 a presumption that fees will be awarded to prevailing parties." *Flores v. Shalala*, 49 F.3d
 11 562, 567 (9th Cir. 1995). To award attorney's fees and costs under the EAJA, the Court must
 12 determine that: (1) the plaintiff is the prevailing party; (2) the government has not met its
 13 burden of showing that its positions were substantially justified or that special circumstances
 14 make an award unjust; and (3) the requested attorney's fees and costs are reasonable. *Perez-*
 15 *Arellano v. Smith*, 279 F.3d 791, 793 (9th Cir. 2002). It is undisputed that Plaintiff is the
 16 prevailing party, and Defendant has not argued that any special circumstances make an award
 17 unjust or that the requested fees and costs are unreasonable. Instead, Defendant contends that
 18 her position in defending the ALJ's decision denying benefits was substantially justified.
 19 Defendant also points out that Plaintiff's request for \$350 for filing costs would be payable
 20 from the Judgment Fund, not agency funds. (Response, p. 1); *see also Lopez v. Astrue*, 2011
 21 WL 1211562, at *1 (D.Ariz. Mar. 30, 2011) ("[C]osts, unlike expenses, are administered by
 22 the Department of Justice.").

23 The Commissioner bears the burden of proving that her position was substantially
 24 justified at each stage of the proceeding. *Corbin v. Apfel*, 149 F.3d 1051, 1052 (9th Cir.
 25 1998). Substantial justification for purposes of the EAJA means that the Commissioner's
 26 position had "a reasonable basis in law and fact." *Id.* (citations omitted). The
 27 Commissioner's positions must be "justified to a degree that could satisfy a reasonable
 28 person." *Pierce v. Underwood*, 487 U.S. 552, 565 (1988). *See also Lewis v. Barnhart*, 281

1 F.3d 1081, 1183 (9th Cir. 2005) (“The Commissioner is ‘substantially justified’ if his position
 2 met the traditional reasonableness standard—that is justified in substance or in the main, or
 3 to a degree that could satisfy a reasonable person.” (internal quotation marks and citations
 4 omitted)). The Commissioner’s position can be substantially justified even if it is not correct.
 5 *Pierce*, 487 U.S. at 566. The appropriate scope of inquiry in deciding substantial justification
 6 is restricted to the issue or issues which led to remand. *See Lewis*, 281 F.3d at 1085. Further,
 7 in deciding whether the Commissioner was substantially justified in her position, the Court
 8 must examine both the underlying agency conduct as well as the Commissioner’s defense of
 9 that conduct. *Kali v. Bowen*, 854 F.2d 329, 332 (9th Cir. 1988).

10 **III. DISCUSSION**

11 In her Opening Brief, Plaintiff argued that the ALJ improperly rejected the opinion
 12 of her treating physician, Dr. Gecosala. The Court agreed and remanded the matter for
 13 further proceedings. Defendant’s position was that the ALJ reasonably considered Dr.
 14 Gecosala’s opinion and, therefore, the ALJ’s RFC finding was supported by substantial
 15 evidence. Acknowledging that the ALJ was required to set forth specific and legitimate
 16 reasons supported by substantial evidence in the record to reject Dr. Gecosala’s opinion,
 17 Defendant accepted and relied upon the ALJ’s characterization of the evidence that Dr.
 18 Gecosala treated Plaintiff only for a limited time, Dr. Gecosala’s examinations of Plaintiff
 19 were not as thorough as other physicians’ examinations with regard to Plaintiff’s physical
 20 capacity, and Dr. Gecosala’s opinion was contradicted by the examining state agency
 21 physician, Dr. Petronella. In Plaintiff’s case, the cited reasons for rejecting Dr. Gecosala’s
 22 opinion were not supported with specificity, nor could it reasonably be argued that they were
 23 supported by substantial evidence in the record. Further, Defendant’s position that Dr.
 24 Petronella’s opinion was based on independent clinical findings constituting substantial
 25 evidence sufficient to support rejection of Dr. Gecosala’s opinion was foreclosed given that
 26 there was no appreciable difference between their diagnoses, nor did Defendant cite any
 27 reasonable basis for determining otherwise. *See Orn v. Astrue*, 495 F.3d 625, 633 (9th Cir.
 28 2007) (where the diagnoses of the treating doctor and examining doctor are the same but their

1 conclusions about the plaintiff's functional limitations differ, the examining doctor's
2 conclusion based on his examination is not considered to be an "independent finding" and
3 his "opinion does not alone constitute substantial evidence to support rejection of...[the
4 plaintiff's] treating physicians' opinions."). On the instant record, Defendant's position did
5 not have a reasonable basis in law and fact and, thus, Defendant was not substantially
6 justified in defending the ALJ's rejection of Dr. Gecosala's opinion.

7 **IV. CONCLUSION**

8 In the context of the instant record, the Commissioner's position on the issues on
9 which remand were based were not substantially justified. Consequently, Plaintiff is entitled
10 to the requested costs and attorney's fees.

11 Accordingly,

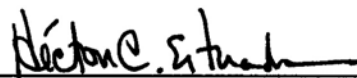
12 IT IS ORDERED that Plaintiff's Petition for Attorney's Fees Under the Equal Access
13 to Justice Act (Doc. 22) is GRANTED in the amount of \$4,063.28 in attorney's fees.

14 IT IS FURTHER ORDERED that pursuant to 28 U.S.C. §2412(a)(1), Plaintiff is
15 awarded \$350 in costs, to be paid out of the Judgment Fund, as administered by the
16 Department of Justice.

17 The Clerk of Court is DIRECTED to amend the judgment accordingly.

18 The Clerk of Court is FURTHER DIRECTED to amend the docket to reflect that
19 Carolyn W. Colvin, Acting Commissioner of the Social Security Administration, has been
20 substituted as the named Defendant in this action pursuant to Fed.R.Civ.P. 25(d).

21 DATED this 13th day of May, 2013.

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24 Héctor C. Estrada
25 United States Magistrate Judge
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